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In the Supreme Court of the United States

OCTOBER TERM, 1982

ISMENE M. KALARIS, ADMINISTRATIVE APPEALS JUDGE, ET AL., PETITIONERS

v.

RAYMOND J. DONOVAN, SECRETARY OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the members of the Benefits Review Board of the Department of Labor, who are appointed by the Secretary of Labor pursuant to a statute that contains no provisions regarding their tenure, may be removed by the Secretary.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-48a) is reported at 697 F.2d 376. The opinion of the district court (Pet. App. 49a-56a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 4, 1983. A petition for rehearing was denied on March 7, 1983. The petition for a writ

of certiorari was filed on April 15, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners are members of the Benefits Review Board of the Department of Labor. The Board is a three-person body that hears appeals from administrative law judge (ALJ) decisions on claims for workers' compensation under the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 901 *et seq.*, and other statutes (see Pet. App 6a n.13). The Benefits Review Board was established by the 1972 Amendments to the LHWCA (Pub. L. No. 92-576, Section 15, 86 Stat. 1261) and was intended by Congress "to provide an internal administrative review of initial decisions in contested cases * * * within the Department of Labor." S. Rep. No. 92-1125, 92d Cong., 2d Sess. 14 (1972). The workers' compensation claimant and the employer are normally the adverse parties before the Board. The Director of the Office of Workers' Compensation Programs (OWCP)—the Department of Labor official to whom the Secretary has delegated responsibility for administering the LHWCA—also may participate in proceedings before the ALJ and the Board. 20 C.F.R. 701.201, 702.333, 801.2(10), 802.201(b). The Board cannot enforce its own orders; a party seeking enforcement of an order must apply to the appropriate United States district court. 33 U.S.C. 921(d).

The Board reviews ALJ decisions on the record, without receiving new evidence, and must uphold an ALJ's factual determination if it is supported by substantial evidence. 33 U.S.C. 921(b); 20 C.F.R. 802.301. The Board's decisions are reviewable in the

appropriate court of appeals (33 U.S.C. 921(c)). On review, the court of appeals duplicates the Board's inquiry: it determines whether the ALJ's conclusions of law are correct and whether there is substantial evidence supporting the ALJ's factual findings. See Pet. App. 8a, 16a-17a; H.R. Rep. No. 92-1441, 92d Cong., 2d Sess. 12 (1972); *Duncanson-Harrelson Co.* v. *Director, OWCP*, 686 F.2d 1336, 1338-1339 (9th Cir. 1982); petition for cert. pending, No. 82-1113; *Presley* v. *Tinsley Maintenance Service*, 529 F.2d 433, 436 (5th Cir. 1976); *Potenza* v. *United Terminals, Inc.*, 524 F.2d 1136, 1137 (2d Cir. 1975).

Under the 1972 Amendments, the Secretary of Labor appoints the members of the Board. 33 U.S.C. 921(b)(1). But the Act does not specify a term for the appointees, nor does it address the circumstances under which they may be removed. In his initial regulations constituting the Board, issued in 1973, the Secretary specified that "[a]ll members of the Board shall serve indefinite terms to be determined in the discretion of the Secretary." 20 C.F.R. 801.201(d).

2. In April 1982, petitioners were informed that they were being removed from the Board and transferred to positions at like grade and salary in the Office of the Solicitor of the Department of Labor. Pet. App. 8a, 9a n.23. Petitioners then brought this action in the United States District Court for the District of Columbia, seeking to enjoin their transfer. They contended both that Congress had not intended the Secretary to have the power to remove them at his discretion and that they were Article III judges with life tenure. The district court enjoined the Secretary from transferring petitioners, reasoning that "[t]he Secretary's interpretation [of the

LHWCA] would permit him to influence claims decisions outside the adjudicatory process through replacement of the entire Board" and that such an interpretation would render the Act unconstitutional as a violation of separation of powers principles. *Id.* at 51a. The district court rejected petitioners' argument that they are Article III judges. *Id.* at 53a.

The court of appeals reversed, stating that it would "hold to the long-standing rule that in the face of congressional silence all inferior officers of the United States serve at the discretion of their appointing officer." Pet. App. 3a-4a. The court of appeals further concluded that "[a]ll of the available evidence indicates that Congress intended to allow the Secretary to remove these Board members in his discretion, and nothing in Article III, separation of powers principles, or the decisions of the Supreme Court prevents Congress from doing so" (*id.* at 48a). The court of appeals agreed with the district court that petitioners are not Article III judges (*id.* at 10a-21a), but it rejected the district court's suggestion that the Secretary's power to remove Board members raised other constitutional questions (*id.* at 38a-47a). The court of appeals noted that while the Board could be described as a quasi-judicial body, "this general characterization does little to distinguish the Board, constitutionally, from the scores of administrative boards and tribunals in the Executive Branch that currently adjudicate claims to federal statutory rights" and that "[m]any statutes directly grant the Executive power to remove officials performing quasi-judicial tasks. * * * Congress has been creating quasi-judicial boards subject to Executive control for years, and the courts have not previously prevented it from doing so." *Id.* at 44a-47a (footnotes omitted).

ARGUMENT

1. a. Petitioners' principal contention (Pet. 8, 11-20) is that the LHWCA prohibits their removal by the Secretary. But the LHWCA is silent on the tenure of Board members, and the established rule of statutory construction is that when an Act of Congress creating an office is silent on the appointee's tenure, the appointee serves at the pleasure of the appointing officer. See, *e.g.*, *Shurtleff* v. *United States*, 189 U.S. 311, 318 (1903); *Reagan* v. *United States*, 182 U.S. 419 (1901); *In re Hennen*, 38 U.S. (13 Pet.) 230, 258-259 (1839). See also *Cafeteria & Restaurant Workers Local 473* v. *McElroy*, 367 U.S. 886, 896 (1961) ("government employment, in the absence of legislation, can be revoked at the will of the appointing officer"); *DeCastro* v. *Board of Commissioners*, 322 U.S. 451, 462 (1944); *Arnett* v. *Kennedy*, 416 U.S. 134, 181 (1974) (opinion of White, J.).

The reason for this principle is that officials whose tenure is not specified must either serve at the pleasure of the appointing authority or hold office for life, and except for the constitutionally prescribed tenure of Article III judges, life tenure in an office is virtually unknown in the federal government. See *In re Hennen*, *supra*, 38 U.S. (13 Pet.) at 259 ("All offices, the tenure of which is not fixed by the constitution or limited by law, must be held either during good behavior, or (which is the same thing in contemplation of law), during the life of the incumbent; or must be held at the will and discretion of some department of the government, and subject to removal at pleasure."). As the Court explained in *Shurtleff* v. *United States*, *supra*, 189 U.S. at 318:

> We [cannot adopt a construction of a statute that] * * * results in the creation of a tenure

> of this particular office, not attached to a single other civil office in the government, with the exception of judges of the courts of the United States. We cannot bring ourselves to the belief that Congress ever intended this result while omitting to use language which would put that intention beyond doubt.

Petitioners' assertion (Pet. 12-15) that a different rule applies to "quasi-judicial" offices is without foundation. *Shurtleff* v. *United States*, *supra*, and *Reagan* v. *United States*, *supra*, the principal cases establishing the rule that an appointee whose tenure is unspecified serves at the pleasure of the appointing officer, involved quasi-judicial offices: a general appraiser of merchandise in *Shurtleff* and a commissioner of the Indian territory, an officer "who performed entirely judicial functions—like justices of the peace" (Pet. App. 36a), in *Reagan*.[1] Moreover, as the court of appeals pointed out (Pet. App. 44a-47a), Congress has created many quasi-judicial bodies whose members serve at the discretion of the executive branch officer who appoints them.

Petitioners rely (Pet. 11-15) on *Humphrey's Executor* v. *United States*, 295 U.S. 602 (1935), and *Wiener* v. *United States*, 357 U.S. 349 (1958). But both of those cases involved appointees whose terms were for a specified number of years; indeed, as the court of appeals noted, the Court in *Humphrey's Executor* "went to great lengths to limit its holding to cases where Congress had defined fixed terms for agency members" (Pet. App. 33a). The *Humphrey's Executor* Court, citing and describing the reasoning

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[1] Petitioners appear to concede (Pet. 13 n.26) that *Reagan* involved a quasi-judicial office; they ignore *Shurtleff*.

of *Shurtleff*, explained that in the absence of any provision respecting tenure, the Court would not assume that Congress intended to deny the appointing authority power to remove the appointee if such a conclusion "reasonably could be avoided." 295 U.S. at 623. The Court further explained that the situation in *Humphrey's Executor* itself was "plainly and wholly different" precisely because "the fixing of a definite term subject to removal for cause" ordinarily "establish[es] the legislative intent that the term is not to be curtailed in the absence of such cause." *Ibid.* *Wiener*, which involved an appointee to the War Claims Commission, explicitly followed *Humphrey's Executor* (see 357 U.S. at 352-353, 355-356), and began from the premise that "[i]n the present case, Congress provided for a tenure defined by the relatively short period of time during which the War Claims Commission was to operate—that is, it was to wind up not later than three years after the expiration of the time for filing of claims." *Id.* at 352.[2]

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[2] Petitioners also suggest (Pet. 14) that the functions of the War Claims Commission were so similar to those of the Benefits Review Board that Congress must have intended the removal power to be the same. But *Wiener* and *Humphrey's Executor* do not suggest that function alone is decisive. In any event, the Court pointed out in *Wiener* that a crucial aspect of the Commission's powers was that its decisions were final and nonreviewable (see 357 U.S. at 354-355); by contrast, the Board's decisions are reviewable by a court of appeals, which essentially duplicates the Board's inquiry.

While petitioners are of course correct in saying (Pet. 12-13) that *Humphrey's Executor* disapproved some of the dicta of *Myers* v. *United States*, 272 U.S. 52 (1926), those dicta concerned not the interpretation of statutes but the authority of Congress to limit the President's removal power (see 295 U.S. at 626-627)—something that is not at issue in this case.

b. As the court of appeals explained in detail (Pet. App. 23a-30a), specific indications of congressional intent reinforce the inference, created by the absence of any fixed term or provision for removal, that Congress intended Board members to serve at the pleasure of the Secretary. First, Congress appears to have specifically addressed the question of the Board's independence from the Secretary, and to have resolved it in a way that leaves no room for the conclusion that Congress intended to insulate Board members from removal by the Secretary. When Congress created the Board, it gave the "most careful consideration to the recommendations of the National Commission on State Workmen's Compensation laws contained in its report issued on July 31, 1972" (H.R. Rep. No. 92-1441, *supra*, at 2). That report recommended that members of appeals boards like the Benefits Review Board be appointed for fixed terms with protection against removal. The report also acknowledged that the interest in holding the executive branch "accountable for agency operations" militated against tenure with fixed terms. Pet. App. 23a & n.56. Thus, it is clear that Congress deliberately chose not to give Board members the kind of tenure that would protect them against removal by the Secretary.

Moreover, Congress did attempt to ensure a degree of independence for the Board; it instructed the Secretary "to keep separate the functions of administering the program and sitting in judgment on the hearings" (S. Rep. No. 92-1125, *supra*, at 13-14). But at the same time, Congress explicitly placed the Benefits Review Board "within the Department of Labor" (*id.* at 14); it is difficult to see why Congress would have placed the Board within the Department

if it wanted to insulate it totally from the Secretary, as petitioners suggest. In *Humphrey's Executor* and *Wiener*, when Congress intended to insulate an appointee from removal, it placed his office outside any executive department. Similarly, it is unlikely that Congress would have made an official with the extraordinary independence petitioners seek an "inferior Officer" appointed by the head of a department, instead of an "Officer[] of the United States," appointed by the President with the advice and consent of the Senate. See Art. II, § 2, Cl. 2. "It cannot, for a moment, be admitted, that it was the intention of the constitution, that those offices which are denominated inferior offices should be held during [good behavior]." *In re Hennen, supra*, 38 U.S. (13 Pet.) at 259.[3]

In addition, when Congress established the Board, it vested in the Secretary the duty of issuing regulations governing the Board's operations. The Secretary protected the Board's independence within the Department by giving supervisory responsibility to the Under Secretary of Labor rather than an Assistant Secretary; the Secretary explained that "the Board's functions are quasi-judicial in character and involve review of decisions made in the course of the administration of * * * several Acts by the Employment Standards Administration which is headed by an Assistant Secretary" (38 Fed. Reg. 6171 (1973)). As we have noted (see page 3, *supra*), however, the Secretary also issued a regulation providing that

[3] See also *United States* v. *Germaine*, 99 U.S. 508, 509-510 (1879), quoted in *Buckley* v. *Valeo*, 424 U.S. 1, 125 (1976) (the Constitution prescribes a different method of appointing inferior officers in order to facilitate "sudden removals" of such officers).

members of the Board "shall have indefinite terms to be determined in the discretion of the Secretary" (20 C.F.R. 801.201(d)). This regulation has remained in force since just after the Board was established. Indeed, it was repromulgated in 1978 with the express approval of the members of the Board—including petitioners. See 43 Fed. Reg. 42149; Pet. App. 26a & n.61. "[A]dministrative practice, consistent and generally unchallenged, will not be overturned except for very cogent reasons * * *. The practice has peculiar weight when it involves a contemporaneous construction of a statute by the men charged with * * * setting its machinery in motion" (*Norwegian Nitrogen Products Co.* v. *United States*, 288 U.S. 294, 315 (1933) (Cardozo, J.); see, *e.g.*, *Zenith Radio Corp.* v. *United States*, 437 U.S. 443, 450 (1978)).

Finally, in 1981, Congress considered a bill, S.1182, that would have removed the Board from the Department of Labor and made its members officers of the United States. Senator Nickles, who introduced S.1182 and who was chairman of the subcommittee charged with oversight of the LHWCA, explained that "[t]he 1972 amendments [to the LHWCA] * * * created a two-step administrative appeal process within the Department of Labor, including a Benefit Review Board whose three members are appointed by the Secretary of Labor *and serve at his pleasure*." 127 Cong. Rec. S5077 (daily ed. May 14, 1981) (emphasis added). In subsequent hearings, witnesses disagreed on the question whether and to what extent the Board should be independent of the Secretary, but agreed that, under the 1972 Amendments, the Board was not already independent. See *Longshoremen's and Harbor Workers' Compensation Act Amendments of 1981: Hearings Before the Subcomm. on Labor of the Senate*

Comm. on Labor and Human Resources, 97th Cong., 1st Sess. 219, 277, 524, 993, 1049, 1063, 1067, 1193-1197 (1981).[4] Although post-enactment events do not have the same weight in interpreting a statute as contemporary history, they may be considered in appropriate cases (see, *e.g.*, *North Haven Board of Education* v. *Bell*, 456 U.S. 512, 535 (1982)), and the history of S.1182 shows a clear congressional understanding that Board members serve at the pleasure of the Secretary. Petitioners fail to cite any evidence of a contrary understanding.

Petitioners instead suggest (Pet. 15-20) that there are countervailing indications of Congress's intent to deny the Secretary the power to remove Board members. The only indications of congressional intent that petitioners adduce are that the Director of OWCP, the Secretary's delegate, may appear before the Board, and that the Board's decisions are not subject to the Secretary's review. But the Director appears before the Board principally by virtue of the Secretary's own regulations, not because Congress has so provided (see 20 C.F.R. 801.2(10), 802.201(a), 802.410(b));[5] this aspect of the Board's procedures therefore reveals little about Congress's intent. And Congress's decision not to provide for the Secretary to review Board determinations *in particular cases* does not suggest that Congress was so concerned about

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[4] S.1182 was not enacted.

[5] See *Director, OWCP* v. *Perini North River Assoc.*, No. 81-897 (Jan. 11, 1983), slip op. 5 & n.10. Of the several workers' compensation statutes that authorize the Board to hear appeals, only the Black Lung Benefits Act of 1972 specifies that the Secretary's delegate may appear before the Board. See 30 U.S.C. (Supp. V) 932(k).

protecting Board members' independence that it took the extraordinary step of granting them life tenure.

2. Petitioners claim (Pet. 20-28) that if the LHWCA permits the Secretary to remove them from office, it violates Article III and the Due Process Clause.[6] These contentions do not warrant the Court's review for a number of reasons. As the court of appeals held (Pet. App. 42a n.91), petitioners lack standing to raise the due process claim, because *their* rights under the Due Process Clause are not jeopardized; their due process argument concerns only alleged unfairness to litigants before the Board, and such litigants are not parties here. See, *e.g.*, *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 474 (1982), quoting *Warth* v. *Seldin*, 422 U.S. 490, 499 (1975) ("[T]he plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties."). We also note that petitioners did not raise their due process contention in the court of appeals. Pet. App. 42a n.91. As far as petitioners' Article III contention is concerned, even if petitioners were to prevail it is unclear that they could obtain the relief they seek. As the court of appeals noted, the proper remedy would be to "declare void the congressional authorization that allows the Secretary to determine the terms upon which Board members serve" because a court "cannot grant these Board members the terms they would prefer." *Id.* at 40a n.89. Thus, the only "remedy" available to peti-

[6] Petitioners also assert that the LHWCA would violate separation of powers principles, but the only separation of powers principles they invoke are those derived from Article III. See Pet. 21-23.

tioners would be the "abolition of the very offices the removed members seek to retain." *Ibid.*

Petitioners' constitutional claims are also without merit. Article III requires "that 'the essential attributes' of judicial power [be] retained in [an] Art. III court" (*Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, No. 81-150 (June 28, 1982), slip op. 30 (plurality opinion)), and an Article III court—a court of appeals—*duplicates* the functions of the Board. See page 3, *supra*. Therefore, Congress's decision not to constitute the Board as an Article III court did not divest Article III courts of *any* judicial power, much less "the essential attributes" of judicial power.

In any event, as the court of appeals noted, it is "obvious" (Pet. App. 40a n.89) that petitioners' Article III contention is foreclosed by *Crowell* v. *Benson*, 285 U.S. 22 (1932), which involved the same workers' compensation program that is at issue here. At the time of *Crowell*, the initial determination on a compensation claim was made by a deputy commissioner of the United States Employees' Compensation Commission. *Id.* at 43-44. That determination was reviewable in a United States district court and could be set aside for legal error or because the factual determinations were unsupported by substantial evidence. *Id.* at 46. This Court upheld the scheme after ascertaining that "constitutional" and "jurisdictional" facts were subject to de novo review by a court. *Id.* at 54-63; see *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, *supra*, slip op. 32 n.34. The scheme challenged by petitioners differs from that upheld in *Crowell* in only three respects: the initial determination is made by an ALJ, not a deputy commissioner; the initial judicial review occurs in a court of appeals, not a district court; and

there is now an additional layer of administrative review—the Benefits Review Board. Article III cannot possibly be offended by any of these changes.

Petitioners urge (Pet. 22-23) that the "crucial" distinction between *Crowell* and this case is that the deputy commissioners who made the initial determination in *Crowell* were "*not* subordinates of the Executive Branch" but officials of "an independent agency" (Pet. 22; emphasis in original). Even assuming that this distinction is constitutionally significant for some purposes, it plainly cannot make any difference for Article III purposes. The deputy commissioners were indisputably not Article III judges but officials of "an administrative agency" (*Northern Pipe Line Construction Co.* v. *Marathon Pipe Line Co.*, *supra*, slip op. 27). That is, the deputy commissioners were no more Article III judges than the ALJs or the members of the Benefits Review Board are. If, as the court held in *Crowell*, Article III permits an adjudicative scheme in which deputy commissioners make the initial determinations, subject to "substantial evidence" review by an Article III court, then Article III must also permit the scheme challenged by petitioners.

Petitioners' due process contention (Pet. 23-25) consists of no more than an assertion that the Due Process Clause prohibits an agency from both adjudicating a claim and taking a position on how the claim should be resolved. This broad assertion, which would invalidate the practices of many administrative agencies, would be incorrect even if the same persons within the agency performed both functions. See, *e.g.*, *Withrow* v. *Larkin*, 421 U.S. 35, 46-58 (1975). Here, the Board and the OWCP, which appears before the Board, are distinct components of the Department of Labor; it is therefore entirely

clear that there is no constitutionally impermissible commingling of functions. See also 5 U.S.C. 554(d); *Marcello* v. *Bonds*, 349 U.S. 302, 311 (1955) (fact that Immigration and Naturalization Service special inquiry officer, who presided at deportation hearing, was subject to supervision and control by INS officials with investigatory and prosecutorial functions did not "strip[] the hearing of fairness and impartiality as to make the procedure violative of due process").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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